No. 16504

United States
COURT OF APPEALS
for the Ninth Circuit

FRANK A. DUDLEY, as Trustee of the Estate of Merle K. Branch and Wanda B. Branch, Co-partners d/b/a Riddle General Store, Bankrupts,

Appellant,

v.

CLIFFORD E. DICKIE and MARION E. DICKIE,

Appellees.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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This Reply Brief is submitted to answer certain of the contentions and arguments and clarify some of the statements contained in the Brief of Appellees.

SPECIFICATION OF ERROR NO. 1

Appellees in their argument on this point cite much general law applicable to conditional sales contracts, but studiously avoid the crucial point which is

"Does the law of Oregon permit the use of a conditional sales contract to secure an alleged seller for goods he never owned and never sold?"

The Oregon cases cited by appellant say "no" as do the vast majority of cases in other jurisdictions, and appellees have cited no Oregon, or other, cases to the contrary.

In fact, appellees cite no cases for their point, because there are none. Appellees retreat to the position that the contract is nevertheless good between the parties which points up the vice of their argument under Specification of Error No. 2 that res judicata or collateral estoppel should apply in the preference suit, since they now must admit that the State Court action did not involve the rights of third parties as does this preference suit but only rights as between the original parties.

Contrary to the conclusion of appellees on page 12 of their brief, Kliks v. Courtemanche, 150 Or. 332 did not involve an attempted use of a conditional sales contract by a moneylender but rather by an equipment dealer in the business of selling machinery as stated by the Court on page 334 of said case.

SPECIFICATION OF ERROR NO. 2

Appellees contend that the decree of the State Court finally and conclusively determined "title" to the after-acquired merchandise and cite Oregon Revised Statutes 43.130.

But an examination of sub-section (1) of said statute shows that it applies only to true "in rem" proceedings of which the State Court action in this case was not one. Sub-section (2) of said statute controls here and provides:

> "(2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity."

It is obvious in the instant case that the Trustee is neither litigating for the same thing, *under the same title,* nor in the *same capacity* when he appears in a preference suit under the avoidance sections of the Bankruptcy Act.

To the same effect see Sakamu v. Zellerbach (Cal.), 77 P.2d 313.

A determination of title is subject to all of the general rules applicable to res judicata and collateral estoppel. The Oregon court in Glaser v. Slate, 196 Or. 625, 633, 251 P.2d 441 held that a determination of title as to particular machinery in an earlier case was not binding in a subsequent case where the parties were different. The Oregon Court in Harvey v. Getchell, 190 Or. 205, 225 P.2d 391 determined that a finding of title in a prior proceeding between the same parties (suit to cancel a deed) was not a bar in a suit between the same parties to quiet title.

AVOIDING EFFECT OF JUDGMENT OF STATE COURT

Appellees argue that appellant should have applied to the State Court to vacate the decree in the State Court action and cite Oregon Revised Statutes 18.160 in support thereof.

The Oregon Court in Stites v. McGee, 37 Or. 574, 576, 61 Pac. 1129, with reference to said statute, stated:

> "The decree in question, however, was not taken against the defendants through any of the causes enumerated in the statute, but was rendered with their knowledge and by their express consent, and hence does not come within the provisions of the section referred to."

In other words, the Oregon Court has said that the statute is not applicable to judgments by stipulation such as is involved in the instant case.

Appellants firmly believe, however, that Congress did not intend that the Trustee's rights under the avoidance sections of the Act should depend upon any such shifting basis as the application of the discretionary powers of State Court Judges in vacating or refusing to vacate decrees, and that even if it had been possible for appellant to vacate said decree, he was not required to do so but could bring this independent proceeding to recover the preference.

The Stites case, supra, also points out that where the decree is entered by stipulation, the Court does not inquire into the merits of the case, and hence makes no determination. Thus, as appellant has urged in his opening brief, there is no basis for collateral estoppel arising out of a consent judgment.

SPECIFICATION OF ERROR NO. 5

Appellant fully understands that he has the burden of proof of all of the elements of Section 60 of the Bankruptcy Act.

However, it is an admitted fact, and the lower Court's finding, that the bankrupts were in possession of the merchandise on and prior to July 1, 1957 (Tr. 21). Oregon Revised Statutes 41.360 provides for the usual presumption that:

> "(11) Things in the possession of a person are owned by him."

This statutory provision is declaratory of the common law rule, 20 Am. Jur., Evidence, Section 237, page 234.

Therefore, possession having been shown in bankrupts, the burden is on appellees to prove that they own the merchandise, which they can only do by pointing out and identifying their particular merchandise.

The Court in Bryant v. Swofford Bros. Dry Goods Co., 214 U.S. 279, 29 S. Ct. 614, 53 L. Ed. 997, 1002 upheld a conditional sales contract of dry goods based upon the following findings:

> "The character and marks of the goods rendered them capable of being identified and separated."
>
> "It follows that, so far as the identified goods and notes and accounts are concerned, the intervener, the dry goods company, must prevail."

Thus, it seems to be universally held that in this situation, appellees must identify their merchandise which they have failed to do.

Appellees have suggested to the Court that as a substitute for evidence the Court should indulge in the fiction of last in-first out, a rule which is contrary to the usual rule of merchants.

Appellant respectfully submits that judgment should be entered for appellant in the sum of $14,786.17 with interest at six per cent per annum from October 4, 1957 until paid.

Respectfully submitted,

BOYRIE and MILLER,
F. BROCK MILLER.